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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
**SOUTHERN DIVISION**

MICHAEL G. DAVIDSON, an  
individual,

Plaintiff,

v.

MANUFACTURERS and  
TRADERS TRUST COMPANY,  
d/b/a M&T BANK, a New York  
Corporation; and BAYVIEW  
LOAN SERVICING LLC, a  
Delaware Limited Liability  
Corporation;

Defendants.

CASE NO.:

**COMPLAINT FOR DAMAGES AND  
EQUITABLE RELIEF:**

- 1. BREACH OF CONTRACT**
- 2. VIOLATIONS OF THE FAIR DEBT  
COLLECTION PRACTICES ACT**
- 3. VIOLATIONS OF THE ROSENTHAL  
FAIR DEBT COLLECTIONS  
PRACTICES ACT**
- 4. VIOLATIONS OF THE TRUTH IN  
LENDING ACT ("TILA")**
- 5. VIOLATIONS OF THE REAL  
ESTATE SETTLEMENT  
PROCEDURES ACT ("RESPA")**
- 6. DEMAND FOR ACCOUNTING**

**DEMAND FOR JURY TRIAL**

Plaintiff MICHAEL G. DAVIDSON ("Plaintiff") brings this action against  
Defendants, Manufacturers and Traders Trust Company d/b/a M&T Bank and

**COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF**

1 Bayview Loan Servicing, LLC (collectively referred to as “Defendants”), and allege,  
2 on information and belief (except as to those allegations relating to Plaintiff, which  
3 are asserted on personal knowledge), as follows:  
4

### 5 **INTRODUCTION**

- 6 1. This case challenges Defendants’ outrageous conduct in servicing the home loan  
7 of Plaintiff Michael G. Davidson.  
8  
9 2. Because Plaintiff lost his job he fell behind on his mortgage. Defendants offered  
10 Plaintiff a permanent loan modification which he timely accepted.  
11  
12 3. Defendants have accepted payments on the modified mortgage for several months  
13 but misapplied his funds and treated the loan as if it were in default.  
14  
15 4. This action seeks actual and statutory damages for unfair debt collection and  
16 unlawfully unfair and bad faith conduct in the handling of Plaintiff’s loan.

### 17 **JURISDICTION AND VENUE**

- 18 5. Subject matter jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331 and  
19 1337 as the action arises under the laws of the United States.  
20  
21 6. Personal and subject matter jurisdiction is conferred on this Court pursuant to the  
22 provisions of Section 84(c)(2) of Title 28 of the United States Code and Section  
23 1331 of Title 28 of the United States Code because this proceeding arises under  
24 the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA), the  
25 Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601, *et seq.* (“RESPA”), the  
26  
27  
28

1 Truth in Lending Act, 15 U.S.C. §§ 11601, *et seq.* (“TILA”), the Fair Debt  
2 Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (“FDCPA”).

3  
4 7. The Court has supplemental jurisdiction over the state law claims under 28 U.S.C.  
5 § 1367.

6 8. Venue and jurisdiction are proper in this District pursuant to 28 U.S.C. § 1391 as  
7  
8 Plaintiff resides in this District, the property that is the subject of this action is  
9 situated in this District, and a substantial part of the events or omissions  
10 complained of occurred in this District.

11  
12 **PARTIES**

13 9. At all times mentioned herein, Plaintiff MICHAEL G. DAVIDSON is an  
14 individual who resides in the County of Orange, State of California.

15  
16 10. Plaintiff is a natural person who residing in the County of Orange, State of  
17 California and is obligated or allegedly obligated to pay a debt and is a  
18 “consumer” as that term is defined by 15 U.S.C. § 1692a(3).

19  
20 11. Plaintiff is a natural person from whom a debt collector sought to collect a  
21 consumer debt which was due and owing or alleged to be due and owing from  
22 Plaintiff and is a “debtor” as that term is defined by California Civil Code §  
23 1788.2(h).

24  
25 12. Plaintiff is a “borrower” within the meaning of 12 U.S.C.A. § 2605 of a federally  
26 regulated loan which is secured by a 1- to 4-family residential property as  
27  
28

1 defined by 12 C.F.R. § 1024.5(a)-(b).

2 13. Plaintiff is a “borrower” within the meaning of 12 U.S.C.A. § 2605 of a federally  
3 regulated loan which is secured by a 1-to 4-family residential property as defined  
4 by 12 C.F.R. § 1024.5(a)-(b) because Plaintiff’s Loan was originated by non-  
5 party Washington Mutual Bank, FA, who was a Federal Savings Bank, as  
6 described in the Deed of Trust securing the Subject Property, dated October 5,  
7 2006, and signed by Plaintiff. (See **Exhibit A**-Plaintiff’s Deed of Trust secured  
8 by the Subject Property).

9 14. Defendant MANUFACTURERS AND TRADERS TRUST COMPANY d/b/a  
10 M&T BANK (“M&T” or “Defendant M&T” hereinafter), is a New York  
11 Corporation engaged in servicing federally related mortgage loans secured by real  
12 property throughout the United States and the State of California. Among other  
13 business activities, M&T acts as a mortgage servicer managing and administering  
14 mortgage loans on behalf of mortgage investors who participate in the secondary  
15 mortgage market. M&T is subject to specific federal laws and administrative  
16 regulations governing its mortgage servicing activities. These laws include, but are  
17 not limited to, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*  
18 (hereinafter RESPA) and implementing Regulation X, (12 C.F.R. Part 1024),  
19 hereinafter “Regulation X,” as well as the Truth in Lending Act and implementing  
20 Regulation Z, (12 C.F.R. Part 1026) hereinafter “TILA.”

1 15. Defendant BAYVIEW LOAN SERVICING LLC (“Bayview” or Defendant  
2 Bayview” hereinafter), is a Delaware Limited Liability Corporation doing  
3 business in the State of California. Bayview has entered into an arrangement with  
4 M&T Bank to perform servicing functions in connection with a number of  
5 mortgage loans, including Plaintiff’s mortgage loan.  
6

7  
8 16. Defendants were the agents, servants, partners, representatives, and/or employees  
9 of co-Defendants, and in engaging in the actions mentioned below, were, unless  
10 otherwise alleged, acting in concert with and within the course and scope of their  
11 authority as such agent, servant, partner, representative, and/or employee with the  
12 permission and consent of co-Defendants.  
13

14 17. Any allegations about acts of any corporate or other business Defendants means  
15 that the corporation or other business did these alleges acts through its officers,  
16 directors, agents, representatives, and/or employee, while they were acting within  
17 the actual or ostensible scope of their authority.  
18

19  
20 18. Defendant Bayview is operating from the City of Coral Springs, County of  
21 Broward, State of Florida, and doing business in the State of California as the  
22 agent or subservicer of M&T.  
23

24 19. Defendant M&T is a company operating from the City of New York, County of  
25 New York, State of New York, doing business in the State of California, by and  
26 through its agent and/or “subservicer” Bayview.  
27  
28

1 20. Defendant M&T, as the principal of Defendant Bayview, conducted business  
2 from the City of Coral Springs, County of Broward, State of Florida in the State  
3 of California.  
4

5 21. Defendants did not originate Plaintiff's mortgage loan account and at the time  
6 the mortgage loan was assigned to Defendant M&T and Bayview for servicing,  
7 Plaintiff's mortgage loan account was in default. As such, Defendants qualify as  
8 "debt collectors" as that term is defined by 15 U.S.C. § 1692a(6).  
9

10 22. Defendants are "servicers" as defined under RESPA 12 U.S.C.A. § 2605(i)(2),  
11 "master servicers" and/ or "subservicers" as defined by 12 C.F.R. § 1024.33, and  
12 Defendants are in the business of servicing loans across the country, including in  
13 the State of California.  
14

15 23. Plaintiff is informed and believes, and upon such information and belief alleges  
16 Defendants service over 5,000 residential mortgage loans, including Plaintiff's.  
17

18 24. Plaintiff is informed and believes, and upon such information and belief alleges,  
19 that Defendants are not attorneys or counselors at law and are persons who, in the  
20 ordinary course of business, regularly, on behalf of themselves or others, engages  
21 in debt collection as that term is defined by California Civil Code § 1788.2(b).  
22

23 Additionally, Defendants activities went beyond the scope of the ordinary  
24 foreclosure process since they engaged in debt collection activities. As such,  
25 Defendants are "debt collectors" as that term is defined by California Civil Code  
26  
27  
28

§ 1788.2(c). Because this case involves a residential mortgage loan, this action arises out of a “consumer debt” and “consumer credit” as those terms are defined by Cal. Civ. Code § 1788.2(f).

## **FACTUAL BACKGROUND**

### **Plaintiff’s Pursuit of Foreclosure Prevention Alternatives**

25. The Property is Plaintiff’s principal residence, is owner-occupied and is a 1-to 4-family residential property.

26. In 2006, Plaintiff entered into a written loan agreement and obtained a mortgage loan through Washington Mutual, FSB, in the amount of \$533,000 (the “Loan”), secured by the Property through a Deed of Trust (recorded on October 12, 2006), then and now the principal residence of Plaintiff. (See **Exhibit A**-“Plaintiff’s Deed of Trust secured by the Subject Property”).

27. Thereafter, JP Morgan Chase N.A. (“Chase” hereinafter) was assigned and/or purchased the Loan and serviced it until on or about November 2013, when Defendants acquired the servicing rights.

28. Plaintiff performed dutifully under the Loan, until late 2009 when he fell behind on his mortgage payments. He applied to his mortgage servicer, Chase, for a mortgage modification in 2010.



29. During the application process, Chase recorded a notice of trustee sale, prompting Plaintiff to retain counsel to challenge the propriety of the non-judicial foreclosure of his home. Plaintiff and Chase eventually entered into a confidential settlement.

30. On or about November 2013, M&T Bank and Bayview acquired Plaintiff's Loan from Chase and since that time, Defendants have acted as the servicer, master servicer, and/or subservicer of Plaintiff's Loan.

**JP Morgan Chase Bank, N.A.'s Release of Plaintiff's Second Mortgage**

**Secured by the Property in 2013**

31. In connection with a settlement it reached with the federal government, Chase notified Plaintiff on January 30, 2013 that it was cancelling the entire amount owed on his second mortgage with Chase. (**Exhibit B**-“Letter from Chase waiving Plaintiff's Obligation under the Second Mortgage”).

32. As part of the settlement, Chase also recorded a Full Reconveyance and Notice of Release of Obligation. (**Exhibit C**-“Chase's Full Reconveyance and Notice of Release of Obligation”).

**Defendants' Servicing and Acquisition of Plaintiff's Loan**

33. On October 31, 2013, Chase notified Plaintiff that **M&T** would begin servicing Plaintiff's loan effective November 16, 2013. Chase's “Servicing Transfer Letter” is attached hereto as **Exhibit D**.



34. Confusingly, Plaintiff subsequently received a letter from M&T dated November 18, 2013, (**Exhibit E**) stating that Chase assigned Plaintiff's loan to **Bayview Loan Servicing LLC** as of November 16, 2013, but M&T would be responsible for servicing the loan. Adding to this quagmire, Chase recorded a "California Assignment of Deed of Trust" on January 3, 2014, purporting to grant, sell, assign, transfer and convey the Deed of Trust, dated October 5, 2006, to Bayview.

35. On December 6, 2013, (attached hereto as **Exhibit F**), M&T sent Plaintiff a letter advising that while M&T was responsible for servicing his loan, he should contact Bayview regarding loss mitigation options.

**Plaintiff's Performance Under the Trial Payment Plan Offered by Defendants**

36. By letter dated September 19, 2014, Bayview, on behalf of M&T, offered Plaintiff a trial mortgage modification or trial period plan ("TPP" hereinafter) set to run from November 1, 2014, to January 1, 2015, which required three monthly TPP payments of \$2,014.30. Plaintiff timely made all three monthly TPP payments.

**Plaintiff Accepted Defendants' Offer for a Permanent Loan Modification**

37. Bayview offered Plaintiff a Permanent Loan Modification in January 2015. The cover letter of the package of modification documents explains the terms and conditions of the modification. A true and correct copy of the Permanent Loan

1 Modification Letter with the Loan modification documents, dated January 21,  
2 2015, is attached hereto as **Exhibit G** (hereinafter the "Modification Agreement").

3 38. Included with the modification papers was a document titled "Return  
4 Instructions." Below the title is a condition stating that "MODIFICATION  
5 AGREEMENT IS CONTINGENT ON RESOLVING PENDING LIEN AND OR  
6 SUBORDINATION ATTACHED TO YOUR PROPERTY." This contingency  
7 was satisfied when Chase agreed to release its subordinate lien in 2013.  
8

9 39. The letter also refers to the Modification Agreement. The Modification  
10 Agreement states that the first monthly payment was due February 1, 2015. The  
11 Modification Agreement reduces the interest rate to 2.0% and extends the term to  
12 forty years, making the new maturity date of the loan January 1, 2055. The new  
13 principal and interest payments are \$1,610.23 per month; and with escrow  
14 included, the fully monthly payment starts at \$2,014.73.  
15

16 40. Plaintiff accepted Bayview's Permanent Loan Modification offer, extended by  
17 Bayview on behalf of M&T, by signing and notarizing the Modification  
18 Agreement, timely returning the signed documents to Bayview, and by making the  
19 required payments to M&T, under the modified mortgage. The Modification  
20 Agreement alters the terms of the mortgage for the remaining life of the loan.  
21

22 41. Plaintiff made his first payment on his modified loan of \$2,014.73 on January 29,  
23 2015 to M&T at the designated address for receiving monthly mortgage payments.  
24  
25  
26  
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28

1 M&T accepted the payment and deposited the funds. However, M&T failed to  
2 properly credit Plaintiff's monthly payments in accordance with the new terms of  
3 the loan.  
4

5 **Defendants' Failure to Update Plaintiff's Loan to Reflect the Terms of the**  
6 **Loan Modification**  
7

8 42. Despite Plaintiff's payment and performance under the Loan Modification and  
9 Chase's releasing its lien against the Property, Bayview sent Plaintiff a letter dated  
10 March 5, 2015, threatening to terminate the "Trial Period Plan" unless Chase's  
11 lien is satisfied or agrees to subordinate it.  
12

13 43. On March 26, 2015, Plaintiff's counsel faxed a letter to Bayview notifying it that  
14 Chase released its lien in January of 2013.  
15

16 44. Bayview's failure to respond prompted counsel to send a "Notice of Error"  
17 ("NOE") pursuant to 12 C.F.R. § 1024.35(b)(7)(11), dated June 19, 2015.  
18

19 45. Bayview acknowledged receipt of the NOE in a letter dated July 1, 2015, and  
20 responded in a letter dated August 3, 2015, explaining that its letter requesting  
21 proof or subordination or satisfaction of Chase's lien should be disregarded. More  
22 importantly, the August 3, 2015, letter stated that "[t]he permanent loan  
23 modification, effective February 1, 2015, was fully converted on April 22, 2015."  
24

25 46. On July 31, 2015, Plaintiff's counsel sent Bayview another NOE by certified mail  
26 (Certified Mail Number 7015 0640 0003 4818 0962), to Bayview's designated  
27  
28

1 mailing address to dispute fees erroneously assessed to his loan. A true and  
2 correct copy of this NOE with the USPS.com tracking information sheet is  
3 attached hereto as **Exhibit H**.  
4

5 47. In the July NOE, Plaintiff challenged the "Miscellaneous Fee" of \$63.50.

6 48. Under 12 C.F.R. Section 1024.35(d), a mortgage servicer has five days  
7  
8 (excluding legal public holidays, Saturdays, and Sundays) to acknowledge  
9 Plaintiff's NOEs, in writing, and within thirty days (excluding legal public  
10 holidays, Saturdays, and Sundays) to investigate the errors asserted, correct the  
11 errors, and provide Plaintiff with a written response detailing the results of its  
12 investigation.  
13

14 49. However, Bayview failed to timely acknowledge receipt of the July 31, 2015,  
15 NOE and respond within 30 days (excluding legal public holidays, Saturdays, and  
16 Sundays).  
17

18 50. Bayview finally replied on September 11, 2015. Bayview denied that any error  
19 occurred stating that "[a]fter review, [Bayview] confirms all corporate advances  
20 and fees for this account were assessed in accordance with all applicable  
21 guidelines and have been deemed appropriate. All charges and fees assessed after  
22 the modification were attributed to litigation." (Attached hereto as **Exhibit I**  
23 Bayview's Response to Plaintiff's NOE.  
24  
25  
26  
27  
28

1 51. Had Bayview conducted a reasonable investigation, it would have discovered that  
2 Plaintiff was not in active litigation with any entity, let alone Bayview and that the  
3 “Miscellaneous Fee” was incorrect.  
4

5 52. Getting nowhere with Bayview, Plaintiff’s counsel sent a NOE via Certified Mail  
6 (Certified Mail tracking number 7015 0640 0003 4818 0979) on July 31, 2015 to  
7 M&T to dispute the “Miscellaneous Fee.” (a true and correct copy of the July 31,  
8 2015, NOE is attached hereto as **Exhibit J**).  
9

10 53. The July NOE was sent to the M&T’s mailing address designated for NOEs:  
11 M&T Bank, P.O. Box 62986, Baltimore, MD 21264-2986. Despite receiving the  
12 NOE, M&T failed to acknowledge receipt and respond.  
13

14 54. Despite Plaintiff’s months of timely payments on his modified loan, Defendants  
15 treated the loan as if it were in default.  
16

17 55. Plaintiff’s June 2015 mortgage statement states that he was over \$8,000 in arrears  
18 on his loan and that his “account is currently in foreclosure.”  
19

20 56. Plaintiff made every payment Defendants demanded of him since January 2015.

21 He has timely made every payment under the permanent modification he entered  
22 into in January 2015, and should be current on his loan. Instead of bringing his  
23 loan current, Defendants have unlawfully misapplied Plaintiff’s payments (e.g.  
24 Plaintiff’s March 2015 payment was not credited to his loan until October 2015),  
25  
26  
27  
28

1 assessed various fees, including but not limited to default-related penalties,  
2 attorney's fees, and property inspection fees.

3  
4 57. Plaintiff has received and continues to receive default notices from Defendants.

5 Additionally, Defendants furnishes credit information on its customers to the three  
6 national credit reporting agencies, Experian, Equifax, and Trans Union, LLC  
7 ("CRAs").  
8

9 58. As of July 30, 2015, rather than reporting Plaintiff was making payments as  
10 agreed, Defendants reported to the three credit reporting agencies that Plaintiff  
11 was increasingly late on his mortgage payments. From January 2015, when  
12 Plaintiff became current on his mortgage, to the present, Defendants reported him  
13 as being seriously delinquent on his mortgage.  
14

15  
16 59. As such, on August 26, 2015, Plaintiff's counsel sent another NOE to M&T via  
17 certified mail (Certified Mail Number, 7015 0640 0001 9814 5098) (The NOE and  
18 the USPS.com tracking information is attached hereto as **Exhibit K**). The August  
19 26, 2015 NOE disputed the trade lines reflecting Plaintiff's loan was in default.  
20

21 60. Defendant M&T received the NOE on September 1, 2015 but failed to timely  
22 acknowledge receipt of the NOE and did not respond within the legally prescribed  
23 time frame. In its letter, M&T contended that it had accurately reported Plaintiff's  
24 loan to the credit agencies. To support its position, M&T attached a transaction  
25 history which failed to accurately reflect Plaintiff's March 2015 payment.  
26  
27  
28

1 61. Finally recognizing that an error occurred, Bayview sent Plaintiff a letter dated  
2 October 14, 2015, advising Plaintiff that his March 2015 payment was credited to  
3 his loan account on October 13, 2015. Included with this letter was a transaction  
4 history showing various default-related penalties, for which Bayview demanded  
5 immediate payment.  
6

7 62. Defendants' failure to provide written acknowledgement of the NOEs and to  
8 timely investigate and correct the errors amounts to a pattern and practice of non-  
9 compliance with Regulation X (*See* 12 C.F.R. § 1024.35; *also see* 12 U.S.C.A. §  
10 2605).  
11  
12

13 63. As a result of Defendants' perpetual harassment, Defendants' breaching their  
14 obligations to Plaintiff under the Agreement, illegally treating his loan as if it is in  
15 default, and their failure to investigate the errors asserted in Plaintiff's NOEs  
16 within the mandatory timeframe, and either correct the errors or provide a written  
17 explanation for why corrections are unnecessary, Plaintiff has suffered, and  
18 continues to suffer emotional distress and fears that Defendants will make good on  
19 their threat and foreclose on his home.  
20  
21

22 64. Defendants' outrageous conduct in treating the loan as in default and threatening  
23 to foreclose on the home while Plaintiff is current on his mortgage has frustrated  
24 Plaintiff's effort to rebuild his life and overcome his financial plight that began in  
25  
26  
27  
28



2009 and ultimately led Plaintiff to initiate this action to prevent Defendants from moving forward with foreclosure proceedings.

**CAUSES OF ACTION**

**FIRST CAUSE OF ACTION: BREACH OF CONTRACT**

**(AS TO ALL DEFENDANTS)**

65. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as though fully set forth herein.

66. Plaintiff has a valid contract with Defendants to modify his mortgage as of February 1, 2015, once he accepted by signing and notarizing the modification offer, returning it as instructed, and performing by making payments under the modification.

67. Plaintiff performed all conditions precedent to the contract. In the alternative, Defendants waived any conditions precedent by accepting performance under the contract in the form of monthly payments.

68. Plaintiff performed the obligations under the loan modification agreement. He fully performed his obligations by signing, notarizing, and returning the loan modification agreement, and making timely monthly payments in the amount required under the modification.

69. The modification agreement obligated Defendants to bring the loan current, to accept payments as timely, and to credit them accordingly.

70. Plaintiff received the fully executed loan modification agreement on May 14, 2015, signed by Mark Churchill, on behalf of M&T Bank, by its Attorney in Fact, Bayview Loan Servicing, LLC. The fully executed loan modification agreement was dated and notarized by Defendants' agent, Mark Churchill on or about May 5, 2015, attached hereto and incorporated by reference as though set forth in full as **Exhibit L** ("Fully Executed Loan Modification Agreement").

71. Defendants breached the loan modification agreement by failing to bring the loan current, and by failing to properly credit Plaintiff's payments. Defendants further breached the modification agreement by attempting to collect and collecting amounts that were not due and owing under the modification agreement, including, without limitation, past due payments, interest, late fees, attorneys fees, and other default-related fees. Defendants also breached the Modification Agreement by characterizing the loan as in default and threatening nonjudicial foreclosure proceedings.

72. Defendants' breach of the Modification Agreement has caused Plaintiff damages in an amount to be proven at trial.

## **SECOND CAUSE OF ACTION**

### **VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT**

#### **(AS TO ALL DEFENDANTS)**

73. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as

1       though fully set forth herein.

2       74. 15 U.S.C. § 1692e prohibits a debt collector from making false, abusive, or  
3       deceptive representations in connection with the collection of a consumer debt.  
4

5       75. Beginning on or about February 1, 2015, and continuing to the present,  
6       Defendants have engaged in the following conduct in violation of 15 U.S.C. §  
7       1692e:  
8

- 9           a. Defendants, in the course of debt collection activities, mischaracterized  
10          the status of Plaintiff's loan as in default when it fact it was not;  
11          b. Defendants, in the course of debt collection activities, attempted to collect  
12          default-related fees when Plaintiff's loan was not in default; and  
13          c. Defendants, in the course of debt collection activities, threatened to  
14          foreclose on Plaintiff's home despite having no legal basis to do so.  
15  
16

17       76. As a result of Defendants' violations of the FDCPA, Plaintiff is entitled to any  
18       actual damages, statutory damages in an amount up to \$1,000.00, and reasonable  
19       attorney's fees and costs pursuant from Defendant.  
20

21       ///

22       ////

23       ////

24       ////

25       ////

26       ////  
27  
28

**THIRD CAUSE OF ACTION**

**VIOLATIONS OF THE CALIFORNIA ROSENTHAL FAIR DEBT**

**COLLECTION PRACTICES' ACT**

**(California Civil Code Section 1788 et. seq)**

**(AS TO ALL DEFENDANTS)**

77. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as though fully set forth herein.

78. California Civil Code section 1788.17 prohibits a debt collector from engaging in false, abusive, or deceptive business practices in connection with the collection of a consumer debt.

79. Beginning on or about February 1, 2015, and continuing to the present, Defendants have engaged in the following conduct in violation of California Civil Code section 1788.17:

- a. Defendants, in the course of debt collection activities, mischaracterized the status of Plaintiff's loan as in default when it fact it was not;
- b. Defendants, in the course of debt collection activities, attempted to collect default-related fees when Plaintiff's loan was not in default; and
- c. Defendants, in the course of debt collection activities, threatened to foreclose on Plaintiff's home despite having no legal basis to do so;

1 80. As a result of Defendants' knowing or willful violations of the RFDCPA, Plaintiff  
2 is entitled to any actual damages; statutory damages for a knowing or willful  
3 violation in the amount up to \$1,000.00; and reasonable attorney's fees and costs.  
4

5 **FOURTH CAUSE OF ACTION**

6 **VIOLATIONS OF THE TRUTH IN LENDING ACT ("TILA") 12 C.F.R.**

7 **1026.36(c)(1)(i)**

8 **(AS TO ALL DEFENDANTS)**

9  
10 81. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as  
11 though fully set forth herein.  
12

13 82. Since March 1, 2015 to the present, Defendant M&T failed to properly apply  
14 Plaintiff's payments under the Modification Agreement to his loan, resulting in  
15 default-related fees and M&T reporting negative credit information on Plaintiff's  
16 credit file with the three credit reporting agencies.  
17

18 83. Each of Plaintiff's payments qualified as periodic payments since each one was  
19 sufficient to cover the principal, interest, and escrow for each given billing cycle.  
20

21 84. Defendants' misconduct in this case, along with the numerous complaints filed with  
22 the Consumer Financial Protection Bureau regarding Defendants' failure to  
23 appropriately credit borrower's accounts with their monthly payments, demonstrates  
24 a pattern and practice of non-compliance with Regulation Z such as to justify an  
25 award of \$4,000 in statutory damages per violation. See  
26  
27  
28

1 <https://data.consumerfinance.gov/dataset/Consumer-Complaints/s6ew-h6mp>

2 **FOURTH CAUSE OF ACTION**

3 **VIOLATIONS OF 12 C.F.R. § 1024.35 [RESPA]**

4 **(AS TO ALL DEFENDANTS)**

5  
6 85. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as  
7  
8 though fully set forth herein.

9 86. 12 C.F.R. Section 1024.35 prescribes that a mortgage servicer has five days  
10  
11 (excluding legal public holidays, Saturdays, and Sundays) to acknowledge  
12  
13 Plaintiff's NOEs, in writing, and within thirty days (excluding legal public  
14  
15 holidays, Saturdays, and Sundays) to investigate the errors asserted, correct the  
16  
17 errors, and provide Plaintiff with a written response detailing the results of its  
18  
19 investigation.

20 87. Defendants violated 12 C.F.R. Section 1024.35 in the following ways:

- 21 a. By failing to timely acknowledge receipt of Plaintiff's July 31, 2015 NOE  
22  
23 and correct the asserted errors within thirty-days;  
24  
25 b. By failing to conduct a reasonable investigation into the errors Plaintiff  
26  
27 asserted. Had Defendants done so, they would have corrected the errors by  
28  
removing the default-related fees assessed to the Loan after the permanent  
modification took effect and not treat the loan as being in default.

88. Additionally, M&T violated 12 C.F.R. Section 1024.35 by:

- 1 a. By failing to timely acknowledge receipt and respond to Plaintiff's August  
2 26, 2015 NOE and correct the asserted errors within thirty-days;  
3  
4 b. By failing to conduct a reasonable investigation into the errors Plaintiff  
5 asserted. Had M&T done so, it would have corrected the errors on  
6 Plaintiff's credit report, which reflected that the Loan was in default when  
7 in fact, it was not.  
8

9 89. Defendants misconduct in this case, along with the numerous complaints filed with  
10 the Consumer Financial Protection Bureau regarding Defendants' failure to  
11 acknowledge, investigate, and correct errors asserted by other borrowers  
12 demonstrates a pattern and practice of non-compliance with the requirements of 12  
13 U.S.C. §2605(f)(1) such as to justify an award of \$2,000 in statutory damages per  
14 violation. See [https://data.consumerfinance.gov/dataset/Consumer-Complaints/s6ew-](https://data.consumerfinance.gov/dataset/Consumer-Complaints/s6ew-h6mp)  
15 [h6mp](https://data.consumerfinance.gov/dataset/Consumer-Complaints/s6ew-h6mp).  
16  
17

18 **FIFTH CAUSE OF ACTION**

19 **DEMAND FOR ACCOUNTING**

20 **(AGAINST ALL DEFENDANTS)**

21  
22 90. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as  
23 though fully set forth herein. The elements for a claim for accounting are: (i) a  
24 fiduciary relationship or other circumstances appropriate to the remedy, and (ii) a  
25  
26  
27  
28



1 balance due from Defendants to Plaintiff that can only be ascertained by an  
2 accounting.

3  
4 91. Defendants have held themselves out to be Plaintiff's creditors and mortgage  
5 servicers. As a result of this purported relationship with Plaintiff, Defendants  
6 have a duty to Plaintiff to properly account for payments made by Plaintiff.  
7 Moreover, a fiduciary relationship between the parties is not required to state a  
8 claim for accounting. All that is required is that some relationship exists that  
9 requires an accounting.  
10

11  
12 92. The mortgage contract between Defendants and Plaintiff allows Defendants to  
13 pay for default-related services when necessary or appropriate, and to be  
14 reimbursed by the borrowers, but it does not authorize Defendants to mark-up the  
15 actual cost of those services to make a profit, nor does it allow Defendants to incur  
16 unnecessary fees if Plaintiff is not actually in default.  
17

18  
19 93. Since the permanent modification went into effect on February 1, 2015, Plaintiff  
20 has timely paid on his loan. As such, any default-related service fees incurred by  
21 Defendants were unnecessary and not sanctioned by the Modification Agreement.  
22

23 94. Any claimed arrearages were a result of these improper fees.

24 95. It would be inequitable and unconscionable for Defendants to benefit from these  
25 illegal fees.  
26

27 96. The actual amount of the arrearages on Plaintiff's loan and the actual amount of  
28

1 money due from Defendants to Plaintiff, and vice versa, is unknown to Plaintiff  
2 and cannot be ascertained without an accounting of the receipts and disbursements  
3 of the these transactions.  
4

5 **PRAYER**

6 **WHEREFORE, Plaintiff prays for judgment against each Defendant, jointly**  
7 **and severally, as follows:**  
8

- 9 1. For damages sustained by Plaintiff due to Defendants' wrongful acts in excess of  
10 the jurisdictional limits in an amount to be proven at trial;  
11
- 12 2. For enforcement of the terms of the Loan Modification;
- 13 3. For disgorgement of all monies acquired by Defendants by means of any act or  
14 practice declared by this Court to be wrongful;  
15
- 16 4. For interest on the sum at the rate of 10% per annum;
- 17 5. For all relief granted under California Civil Code §2924.12(b);
- 18 6. For reasonable attorney's fees and costs of suit, as allowed by both state and  
19 federal law, and all other relief granted under Civil Code §2924.12(i);  
20
- 21 7. For recovery of statutory damages under TILA of \$4,000.00 per violation of  
22 TILA;  
23
- 24 8. For recovery of statutory damages under RESPA of \$2,000.00 per violation of  
25 RESPA;  
26
- 27 9. For such other and further relief as this Court deems just and appropriate.  
28

**TRIAL BY JURY**

Pursuant to the Seventh Amendment to the Constitution of the United States of America, Plaintiff is entitled to, and does hereby demand, a trial by jury.

Dated: November 25, 2015

**MANNING LAW OFFICE  
A PROFESSIONAL CORPORATION**

By: \_\_\_\_\_

Joseph R. Manning, Jr., Esq.

Michael Manning, Esq.

Phillip B. Nghiem, Esq.